

SUPREME COURT OF THE UK: FIFTH ANNIVERSARY SEMINAR:
How much has changed? And what might change in the years ahead?

This is a note of a seminar held at the Supreme Court of the United Kingdom on 1st October 2014 to mark the fifth anniversary of its opening. The seminar was organized in conjunction with an AHRC project on [*The Politics of Judicial Independence in the UK's Changing Constitution*](#). Those participating in the seminar had a professional interest in the Court, with contributions from judges, practitioners, officials and academics. The seminar covered four main issues: (1) the Supreme Court as a 'constitutional court; (2) single judgments and dissents; (3) administration, funding and appointments; and (4) communications and accessibility. The discussion was conducted under the Chatham House Rule. This note is intended to give a general impression of some of the themes discussed at the seminar, and was prepared by a member of the team working on the AHRC project referred to above.

SINGLE JUDGMENTS AND DISSENTS

Overview

Everyone agreed that the Supreme Court's judgments must be clear, principled and authoritative. Beyond this, there remains considerable scope to debate the appropriate form and content of a judgment. Given that most appeals are decided by reference to particular facts, the Court (and the individual Justices) must grapple with very difficult questions such as: how far is it appropriate to generalize a statement of legal principle? Should a judgment simply state the necessary facts, the applicable legal principles and the reasons for them and the outcome, or should it also include competing arguments, much of the authorities relied upon and the counter-arguments as well as expressing any judicial doubts? Across the world there are different models that top courts follow. The traditional common law approach, at one extreme, envisages an appellate bench as comprising a number of judges who happen to be hearing the same case, whereas the civilian view is more of a single bench that just happens to include more than one judge. One judicial participant commented that an interesting effect of international judicial co-operation and comity is that there seems to be a move towards a middle way.

Dissenting Judgments

Judicial participants who contributed to the discussion of dissenting judgments agreed a dissent should be driven by a judge's conviction that the majority have simply got it wrong or that the outcome of the case is right but the reasoning wrong. It was noted that there is a respectable view that it is a betrayal of the judicial oath if a Justice said that they agreed with a judgment with which they disagreed, although on judicial attendee suggested that this was putting it a little high.

Whether a Justice dissents, and how extensively he or she dissents, may depend on the nature of the case. It was suggested that losing advocates may often welcome a dissenting judgment as being some consolation to know that they have had some effect on some members of the Court, while allowing winning advocates to feel that they had won a difficult case. It was noted, however, that a dissent may be a mixed blessing for the losing parties.

It was observed that a feature of dissenting judgments in some jurisdictions is rude or scathing comments on the majority view. One judicial attendee suggested that such comments are not only harmful to harmonious relations within a top court as well as to that court's reputation, but

also self-defeating. It was suggested that the Justices of the UK Supreme Court have a good, if not wholly untarnished, record on this front.

The dissent rate on the Court has gone down substantially in the last couple of years. There was some discussion of the possible reasons for this. One reason suggested was the fact that the Court is sitting in large panels less frequently, with dissent rates increasing as panel size increases. Another suggestion was the fact that there is more teamwork on the Supreme Court than in the House of Lords. The more that the Justices work together, the more draft judgments are circulated, the more opportunity that individual Justices have a chance to make their views known and influence the content of judgments. One judicial attendee pointed to a more prosaic reason for the lower number of dissents: there have simply been fewer cases upon which the Justices had cause for disagreement.

Single Judgments and Concurring Judgments

Every Justice has the right—and indeed the duty—to decide whether a case is one on which he or she should write a judgment. While the decision whether or not to write should take into account the views of others and the reputation of the Court, the decision is ultimately one for each Justice and each Justice alone. One judge wondered whether it is right for judges to compose a judgment when they have nothing really to add to the lead judgment, suggesting that it is questionable whether judges should write a judgment simply because they are interested in the case or because they think they can do a slightly better job etc. That said, there is no one-case-fits-all answer.

Concurring judgments can be especially valuable in some circumstances: e.g. where a Justice agrees with lead judgment's outcome, but not its reasoning, or where the Court is developing the law forward in a complex and controversial area and where dialogue is appropriate. An obvious recent example of the latter is *Nicklinson* on assisted suicide where all nine Justices wrote judgments.¹ One of the barrister attendees acknowledged that concurring speeches are clearly appropriate in cases involving high principle, but stressed that there can be chaos day-in-day-out in lower courts as a result of the inability to distil what five judges of the House of Lords or the Supreme Court had said in this or that case. This has real implications for the public purse. Clarity is especially vital on procedural questions, which would suggest that single judgments are especially appropriate in that context.

The use of single judgments in the Appellate Committee of the House of Lords ebbed and flowed. There was a fairly dramatic rise in their use following the Supreme Court's creation in 2009, with an average of 60%. Various possible reasons for this rise were discussed. First, it might be a response to concerns articulated in the Court of Appeal about the confusion that can be caused by concurring judgments. Second, personnel changes might also be relevant: some of the Justices who had expressed such concerns when on the Court of Appeal had since been elevated to the Supreme Court, and some of those on the Supreme Court who had been opposed to single judgments had since retired. Third, the rise may also be related to the increasing workload of the Court, which has continued to rise over the last 30 years. Fourth, the greater propensity for teamwork on the Court might also be relevant. One Justice commented that there had been occasions when they had written a draft judgment, but later decided that they were content to withdraw it and sign up to a judgment written by a colleague.

¹ *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38.

There was a back-and-forth between several participants about the pros and cons of single judgments. Advantages can include a shorter decision for lawmakers, academics and practitioners to consider. Single judgments ought, in theory, to leave less room for inconsistency or uncertainty as to the applicable legal principles, although sometimes they do not bring greater clarity. However, a single judgment has the concomitant disadvantage of leaving the law in a more monolithic, less flexible state, which can be a disadvantage in some cases. Other disadvantages can include that losing parties and their advocates might wonder whether the other Justices gave the case the attention it deserves if there is only a single judgment, no matter how much that they may in fact have contributed to the discussions about the decision, and even to the specific contents of the final judgment. Single judgments might also be long, although not necessarily any longer than the combined length of two or more concurring judgments.

A commonly cited complaint about single judgments is that they lead to a loss of individuality and idiosyncrasy. It was noted, however, that there is still scope for and examples of highly individual and idiosyncratic single judgments. A further risk of an increasing reliance on single judgments is that this limits the opportunity for Justices to write judgments, with the result that they make unequal contributions to the Court. However, it was noted that there had been an evening out of the workload across the Justices despite the increase in single judgments. Finally, it was suggested by one participant that single judgments lead to a loss of transparency. The more that the Justices work together in teams, and the more discussions that occur before and after the hearing, and the more that draft judgments are exchanged and amended, the greater the gap between the Court's final product and the process that has given rise to it, which arguably leads to less transparency.

Joint Judgments

The use of joint judgments (a single judgment not ascribed to any particular Justice, but written in the name of the Court) is not a novel phenomenon, but there was some discussion about whether it might become more frequent in the years ahead. Of 58 cases decided since December 2013, 4 have resulted in joint judgments. Some Justices have written more joint judgments, particularly the President and the Deputy President, but most Justices have written some.

Who writes the Lead Judgment?

The presiding judge decides who is going to write the lead judgment. The Justices will discuss the case after the oral hearing, and, if there is a difference of opinion, one of the Justices in the majority will be asked to write the lead judgment. If there is no such difference of opinion, then the presiding judge might decide that one of the Justices on the panel is especially well-placed to write the judgment, perhaps because of expertise in the field or taking into account workload distribution.

Sometimes the dissenter writes the first judgment, which looks a bit odd. The reason is that he or she was not a dissenter when after the oral hearing it was decided they were going to write the judgment.

The Justices write an average of eight lead judgments a year (although the allocation of lead judgment is skewed by factors such as the tendency to ask one of the Scottish Justices to write the lead in Scots law cases).

Panel Size

The Court has published a [statement](#) about the criteria that are taken into account when determining whether more than five Justices should sit on a panel. There was some discussion of whether, under the leadership of Lord Neuberger as its President, the Court had adopted a stricter interpretation of these criteria. It was suggested by some attendees that Lord Neuberger was less convinced than his predecessor (Lord Phillips) about the need to sit in enlarged panels. Larger panels can lead to delay in handing down judgments. A practitioner commented that the real problem with larger panels is that it can lead to less substantial, more superficial oral exchanges during the hearing than where there is a five-judge panel. For one Justice, the credibility of the Court's decision is enhanced in the most difficult, "knife-edge" decisions where there is a larger panel, which avoids significant cases being decided by 3-2. This prompted debate about whether a 4-3 split on a seven-judge panel is any less unfortunate than a 3-2 split on a five-judge panel.

During the discussion it was noted that the criteria for when a larger enlarged panel should be used includes if the Court is being asked to depart, or may decide to depart, from a previous decision. One of the Justices observed that the fact that the Court is sitting as a five-judge panel does not preclude overruling a previous decision. There has been occasion where one of the parties had indicated that they would argue for the Court to overrule a previous decision, but the Court had not felt it was necessary to sit as a seven-judge panel. The Court had reassured the parties that the fact that it would not sit in an enlarged panel did not mean that the Court had already resolved not to depart from the previous decision.

THE SUPREME COURT AS A CONSTITUTIONAL COURT

Characterising the Supreme Court as Constitutional Court

There was some discussion about whether it was apt to talk of the UK Supreme Court as a constitutional court and what might be implied by this description. One participant suggested that the Supreme Court should be viewed not as one constitutional court, but four constitutional courts, depending on the particular jurisdiction from which any given case has arisen, which underscored a larger point about the different constitutional narratives and histories that exist across the UK. There was also some discussion about whether the Court adopts—or ought to adopt—different approaches when policing the EU boundaries of the UK Parliament, versus the Scottish Parliament or the Northern Irish Assembly or the Welsh Assembly. One participant suggested that the remedial powers are quite different, but the substantive limits that the Court is being invited to apply will (and perhaps also ought to) be similar or the same. It was further suggested that there might be useful cross-fertilisation to be drawn from jurisdictions within the UK where the ability of courts to strike down legislation is an established part of the legal landscape.

Devolution Jurisdiction

One major source of the Supreme Court's constitutional jurisdiction in recent years has been devolution. It was noted that most of the Scottish devolution cases were not about Acts of the Scottish Parliament, but rather about actions of the Scottish Government, and most had also concerned compatibility issues under the Human Rights Act. In these ways most the devolution case law from Scotland raised the type of legal questions with which the Justices were already very familiar. This changed with the *AXA* case which concerned the powers of the Scottish Parliament and which held that the Scottish Parliament were not subject to judicial review on

traditional public law grounds of judicial review of administrative action.²

All of the cases from Scotland have been concrete review cases. There have been no abstract review cases (i.e. references by a law officer of legislation thought to be beyond the legislative competence of the Scottish Parliament). There have been three abstract reviews from Wales, two of which were referred by the Attorney-General and one by the Counsel General for Wales. This does raise novel issues for the Court inasmuch as the Justices do not enjoy the benefit of judgments from lower courts. One participant suggested that the years ahead might involve the following questions: What are the pros and cons of abstract review? How might governments think about it?

There was some discussion about why the abstract cases have come from Wales and not Scotland or Northern Ireland. In respect of Northern Ireland, it was noted that various political difficulties had meant that the devolved institutions had not approved as much legislation. One participant observed that it was surprising that there had been no references regarding Scotland given that it had been anticipated that this would be a routinely used mechanism to clarify the scope of the devolution settlement. Another participant noted that the devolution legislation had been cleverly drafted: e.g. the flexibility to make orders amending the competences of the devolved bodies. There is also considerable cooperation between the devolved governments and the UK Government that results in disagreements being resolved without recourse to the Court. It was suggested in almost any field of government policy it was not a single government, whether central or devolved government, which had all the relevant policy tools at its disposal (ie. the legal competence, the resources, expertise and so on). In most policy areas, one tier of government had one or two of those things; but the other tier had something else in the toolkit required for effective public policy. This was a very strong incentive that drives at least the officials to co-operate with each other, even when you get governments of quite strongly different political persuasions. Finally, one of the practitioners also raised the question of whether to refer an abstract question is regarded in the minds of some politicians as a declaration of war by one side on the other, rather than as an attempt to define and safeguard the constitutional boundaries. Another practitioner suggested that this was inevitably the case.

EU and ECHR

Other aspects of the Court's constitutional jurisdiction include the EU and the ECHR. One participant suggested that in respect of both EU and ECHR, the Supreme Court has brought an analytical rigour to this regional jurisprudence, and indeed to other comparative jurisprudence, that is displayed in few, if any, other European courts. This participant went on to suggest that the Court has also asserted a kind of independence. For example, in respect of the European Court of Human Rights, the Court has refused to abandon common law rights. The Court has also suggested that while it should normally follow the decisions of the Grand Chamber of the European Court, the Court may depart where a truly fundamental principle of domestic law has been overridden, or there has been a most egregious oversight on this understanding of domestic law. Among the questions that this raised is whether the Court's approach is a hostage to fortune, or is it a wise indication of some independence.

ADMINISTRATION, FUNDING AND APPOINTMENTS

Administration

² *AXA v Lord Advocate* [2011] UKSC 46.

The Court is very much a UK institution with a unique constitutional status. It does not form any part of either the Ministry of Justice or the Courts Service of England and Wales or the Courts Services of the other UK jurisdictions. However, the removal of the buffer of the House of Lords has pushed the Court's administrative limb into a much closer, and sometimes strained, relationship with the Ministry and the Treasury. In the language of Whitehall, the Court is a *non-ministerial government department*; i.e. a separate, small department of state, with its own budget and the Chief Executive as its accounting officer. During the Court's first few years, some officials in Whitehall struggled to understand its status, and treated the Court as akin to an executive agency that is tasked with delivering a service under the control of central government. Understandings of the Court's status have improved in recent years.

Created under the Constitutional Reform Act 2005, the Court is a creature of statute. The Act maps the responsibilities of and relationships between the Lord Chancellor, the Court's President and the Chief Executive. The fact that many of its provisions are very detailed means that in practice the Act is rather restrictive. Tensions have arisen between the Court and the Ministry about how to interpret its provisions. One reason for such tensions was the lag between the passing of the Act and its implementation, the latter culminating in the Court's opening in October 2009. Many of the officials in the Ministry who had been involved in the passage of the legislation have moved on to other roles, and some who replaced them have not shared the same understanding of the Act. Some participants expressed a more general concern that even senior officials in Whitehall do not always have a good grasp of what judicial independence entails, although again most felt that there had been a marked improvement of late.

Those involved in the running of the Court stressed that after a series of challenges in the Court's early years relations with the Ministry had improved. This was reflected in the agreement in early 2014 of a Concordat between the Court and the Ministry. The Court has also negotiated effectively with the Ministry behind closed doors. Examples include the changes in the Crime and Courts Act 2013 that amended the way that the Chief Executive is appointed and removed the Lord Chancellor's role in the Court's staffing decisions.

Between 2009-2011 the Ministry was responsible for the administration of the Judicial Committee of the Privy Council. Though located in the Supreme Court building, the Privy Council's staff all remained Ministry staff. In 2011, however, the Court assumed responsibility for the running of the Privy Council.

Funding

The Court's operating costs are higher than those of the Appellate Committee of the House of Lords. However, this was always going to be the case since many of the costs of the Appellate Committee were subsumed with the total running costs of the wider House of Lords. One benefit of the new funding arrangements is that there is greater transparency about the total cost of running the UK's top court. Inevitably, this makes it easier for people to criticize the Court as expensive. However, as one participant put it, if the UK wants to have a supreme court the country needs to be willing to pay a modest amount for it.

The Court's funding formula has presented challenges and is an issue that may need to be revised in the future. There are four parts to the formula:

1. To cover the cost of civil work, the Courts and Tribunals Service in England and Wales, the Northern Ireland Court Service and the Scottish Government make contributions in proportion to the number of cases that have historically originated in those jurisdictions;
2. The Treasury provides a grant for criminal and public caseload;
3. The Court charges fees; and
4. There is also income from market initiatives (e.g. from the Court's gift shop or corporate venue hire).

There is some flexibility over the budget; for example, if the fee income is higher than anticipated, the Court can apply to the Treasury to use that money. But the formula's potential fragility was illustrated in 2011 following the Court's decision in *Fraser v HM Advocate*.³ Displeased by the decision, the Scottish Cabinet Secretary for Justice, Kenny MacAskill MSP, seemed to threaten to withhold the funding due from the Scottish Government, saying "he who pays the piper calls the tune".

Appointments

Participants at the seminar were in broad agreement that the Court is a much more transparent, responsive and accountable institution than the Appellate Committee of the House of Lords. However, some expressed concern that one area out of kilter with this greater stress on accountability is the process for appointing the Justices. A particular concern was that the Lord Chancellor's role has become vestigial: no use has been made of his power to reject or request reconsideration of recommendations made by the ad hoc selection commissions. Some participants expressed the concern that, if unused, the Lord Chancellor's powers might effectively become unusable, and the selection commissions would then become de facto appointing bodies. As a result, the Lord Chancellor would offer a veneer of accountability but little in reality. Other participants did not share this concern, arguing instead that ministerial involvement in the selection of judges—and possibly even vetoing judges who were recommended for appointment by a selection commissions—is a greater concern.

It was noted that under the current selection process the serving Justices are consulted *individually*. Under the old appointments regime consultation was collective: the Lord Chancellor would invite all of the Law Lords to a meeting to discuss vacancies.

Some participants called for a larger and more balanced selection commissions. It was suggested that the commissions should be more representative. This would necessarily result in commissions recommending different candidates for appointment, but would nevertheless improve the perception of the selection process.

COMMUNICATIONS AND ACCESSIBILITY

The Supreme Court has a six-person communications team (including those who staff the Reception desk and deliver guided tours). By contrast the Appellate Committee of the House of Lords had no dedicated communications operation.

³ (2011) UKSC 24.

Over 360,000 people have visited the Court since October 2009, although there is still work to be done to ensure that the public is aware that the Court welcomes visitors. In each of its first five years, the Court has welcomed around 350 educational visits by schools, colleges and university groups, with a spread from across both state and independent sector at school level and a range of higher education institutions.

The Court began live-streaming via the Sky News website in 2011, with an average of 18,000 viewers every month. The Court now also has a YouTube channel. The most viewed clips are not from the cases that might be thought to raise the issues of greatest public importance or that attract the most press coverage, but those cases that attract special interest groups (e.g. *Richardson v DPP*⁴ and *P v Cheshire West*⁵).

Media Engagement

The Court's approach to media engagement is shaped by the fact that the era of the specialist legal reporter is over. As a result the Court itself has to be much better at explaining its decisions as well as its role more generally.

The Court as a corporate body is interested in hearing what others think about it. The Court's Head of Communications provides monthly reports reviewing coverage of the Court, which goes to all Justices as well as senior management.

Naturally, the Court cannot be seen to be "spinning", but its communications operation does involve the Court in asserting and positioning itself: e.g. it sends signals about what cases it thinks are particularly noteworthy by highlighting some cases in its annual reports but not others. The Court's communications team will identify cases likely to generate media interest in advance and give advance notification to the journalists on its media distribution list. For high profile cases, the Court also allows journalists from the main broadcasters and the Press Association to read the judgment and press summary 45 minutes before hand-down to enable them to immediately report on it. Members of the communications team are also on hand to help answer questions. For very sensitive cases, the most recent being *Nicklinson*, the Court might offer journalists a further précis of the press summary to help steer very early coverage. The communications team monitor closely the early coverage of the Court's decisions. If the coverage is incorrect or has been significantly over-egged, the communications team will let the journalists know.

The Court's media engagement has included press conferences, TV documentaries, profile interviews and feature pieces. The Court does not give off-the-record briefings. As one judicial participant put it, one reason why the Court is treated relatively well by the press is because the Court plays a completely straight game with journalists.

Judicial Speeches

There was some discussion about the increasing level of judicial speech-making. One participant pointed to a prosaic reason for the increase: judges are simply being asked to give more and more speeches and receive many more invitations than they accept. There was some debate about whether there are now more abrasive references to the views of colleagues in judicial speeches that discuss prior decisions of the Court. Most of the judges who commented suggested that

⁴ [2014] UKSC 8.

⁵ [2014] UKSC 19.

cross-references to the decisions and opinions of other judges are inevitable in judicial speeches that discuss case law. While there was scope for discussion of the views of judicial colleagues in judicial speeches to get out of hand, most of the judges who commented felt that this has not happened to date. Rather, the fact that judges feel able to express disagreement with each other is a testament to their willingness to accept criticism.